Public Knowledge

August 15, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Business Data Services in an Internet Protocol Environment, **WC Docket No. 16-143**; Special Access for Price Cap Local Exchange Carriers, **WC Docket No. 05-25**; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, **RM-10593**

Dear Ms. Dortch:

On August 11, 2016, Phillip Berenbroick of Public Knowledge; Michael Calabrese of New America's Open Technology Institute; Todd O'Boyle of Common Cause and Next Century Cities; John Windhausen of the Schools, Health & Libraries Broadband Coalition; and John Howes of the Computer & Communications Industry Association (collectively, "Competition Advocates"), met with Stephanie Weiner, Senior Legal Advisor to Chairman Wheeler; Bill Dever, Office of General Counsel; and William Layton, Wireline Competition Bureau, Pricing Policy Division. Attendees discussed issues in the above-captioned proceedings.

The Competition Advocates urged the Federal Communications Commission ("Commission") to proceed quickly to reform the business data service ("BDS") market and adopt a final Order in 2016. Reforms to the BDS regulatory regime must provide a platform for robust competition and eliminate the monopoly and oligopoly rents that plague the BDS market. Ultimately, the Commission's reforms must serve the public interest and protect customers, and ultimately consumers, from the market power of incumbent local exchange carriers ("LECs").

The BDS proceeding was initiated in 2005,[1] and for more than a decade, competition has languished and enterprise customers and consumers have borne the cost of the market power exercised by the incumbent LECs. Between 2014-2015, the Commission collected data on the

[1] *See* AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services; RM-10593; at 1-7, 20, 34-36, 39-40 (filed Oct. 15, 2002) ("As detailed below, there is now indisputable proof that: (i) large LECs, and particularly the Bell Operating Companies ('Bells'), retain pervasive market power in the provision of these services, (ii) the large ILECs are abusing that market power with patently unjust and unreasonable rates that impose a multi-billion dollar annual overcharge or tax on American businesses and consumers and also severely harm both local and long distance competition, (iii) the Commission's existing rules are incapable of addressing this worsening crisis, and, indeed, only exacerbate the problem, and (iv) the Commission therefore has a clear legal obligation promptly to reform its regulation to protect the public interest and to put an end to these monopoly abuses.").

BDS market, and "[t]he dataset likely represents the most comprehensive collection of information ever assembled for a Commission rulemaking proceeding."[2] Economists reviewing the dataset have confirmed what has been long known – that in the vast majority of BDS customer locations, there is little or no competition.[3] Further, the record demonstrates that the Herfindahl-Hirschman Index ("HHI") "exceeds 5,000 in approximately 99 percent of census blocks" where BDS is provided by an incumbent LEC.[4] By comparison, the Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines* characterize a market with an HHI above 2500 as "Highly Concentrated."[5] Thus, the Commission must adopt appropriate regulations to constrain incumbent providers' market power and ensure just and reasonable rates, terms, and conditions for BDS, as required by Section 201(b) of the Act.[6]

The Competition Advocates explained that to sufficiently address the lack of BDS competition, reforms to the Commission's regulatory approach must be effective, flexible, and future-proof. First, to effectively address the lack of BDS competition, any Competitive Market Test ("Test") the Commission adopts must look for the existence of actual competition in BDS markets, rather than potential competition. The Commission's predictive judgments regarding BDS competition have often been inaccurate and misguided in an effort to justify unwarranted deregulation. Here, the Commission should focus on actual competition and existing competitors, lest it repeat past mistakes.[7] Additionally, limiting its analysis to actual competition and existing competitors will ensure the Test is accurate and administrable.

The Commission's approach must also be flexible enough to address changes in the competitive landscape over time. Re-applying the Competitive Market Test at regular intervals, based on updated data, will help the agency ensure just and reasonable rates, terms, and conditions in areas initially deemed competitive but where competition backslides over time, as

---

[2] Business Data Services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services; WC Docket Nos. 16-143, 15-247, 05-25, RM-10593; *Tariff Investigation Order and Further Notice of Proposed Rulemaking*; 31 FCC Rcd 4723, 4737-4743 ¶¶ 29-43 (2016) ("*FNPRM*").
[3] *See id.* ¶ 175 (explaining Dr. Jonathan Baker's findings that "'almost all buildings (at least 95%) have no more than two providers'"); *id.* ¶ 178 (describing Susan Gately's findings that "'the ILEC is the only provider with a facilities-based dedicated connection (special access) at roughly 3 out of every 4 building/cell tower locations with special access demand'"); *id.* ¶ 181 (discussing Dr. Stanley Besen and Dr. Bridger Mitchell's findings that "'approximately 73 percent of special access purchaser locations are served by a single ILEC with no other facilities-based supplier reported present'" and that "'almost all purchaser locations, 97 percent, are served by only one or two suppliers . . . .'").
[4] *Id*. ¶ 183 (quoting Declaration of Stanley M. Besen and Bridger M. Mitchell, WC Docket. No. 05-25, at 20-21) (originally filed Jan. 27, 2016 and revised consistent with protective orders Apr. 11, 2016)).
[5] United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines 19 (2010), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.
[6] 47 U.S.C. § 201(b).
[7] *See* Public Knowledge Letter to FCC Chairman Tom Wheeler; WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 16, 2016).

well as enable the agency to refrain from applying regulation in areas initially deemed non-competitive but where effective competition has developed.

The Commission's reforms must also be technology-neutral and future proof. Changing technologies – from legacy TDM services to packet-based services – do not magically lower the extremely high financial and operational barriers to competitive deployment of the facilities needed to deploy BDS. Likewise, the change from TDM to Ethernet technology does not eliminate incumbent LEC market power. Accordingly, the Commission should reject claims that regulations to ensure just and reasonable rates, terms, and conditions for packet-based BDS are unnecessary. Moreover, the Commission's BDS regulatory framework should be provider neutral. Any provider with market power in markets deemed to be non-competitive should be subject to the Commission's regulatory regime, while providers in markets deemed competitive and providers without market power should be exempt.

The Competition Advocates noted that the lack of BDS competition burdens the entire economy, and these costs are ultimately borne by consumers and the public. Earlier this year, the Consumer Federation of America ("CFA") found that overcharges and abusive pricing in the BDS market totaled approximately $20 billion per year over the past five years, and have indirectly cost American consumers over $150 billion since 2010.[8] Monopoly BDS rates charged by incumbent LECs hinder new and small businesses, as well as large firms, non-profits, community anchor institutions, wireless carriers, and state and local government agencies. The Commission should move quickly to reduce this immense burden on American businesses, consumers, and the broader economy.

For small and emerging businesses, the price of BDS can be the difference between a firm remaining in business or closing its doors, and a new business deciding whether to launch at all. Effective reform of the BDS market would "lower the costs of launching businesses, which will lead to a cycle of more startups, more jobs, and more innovation,"[9] and "provide small businesses with affordable access and choice regarding the services they need to grow and create new jobs."[10] The current BDS market, with monopoly rates and almost non-existent customer choice, costs American business tens of billions of dollars per year, sapping economic growth and limiting business investment. Promoting a competitive BDS market would serve the public interest by enabling businesses to redirect these overpayments to investments in American workers, new business formation, research and innovation, and savings for consumers.

Similarly, community anchor institutions and state and local government agencies also pay exorbitant rates for BDS. These costs ultimately fall on every American taxpayer. Instead of using resources to serve and connect communities, make government services better and more efficient, hire and train teachers and first responders, and rebuild America's aging infrastructure,

---

[8] Mark Cooper, Consumer Federation of America, The Special Problem of Special Access: Consumer Overcharges and Telephone Company Excessive Profits 1, 33-35 (2016), *available at* http://consumerfed.org/wp-content/uploads/2016/04/4-16-The-Special-Problem-of-Special-Access.pdf.

[9] Evan Engstrom, Policy Director, Engine, *Starting Up the Broadband Economy*, Recode, Dec. 3, 2015, http://recode.net/2015/12/03/starting-up-the-broadband-economy (last visited Aug. 12, 2015).

[10] Comments of U.S. Small Business Administration, Office of Advocacy; WC Docket No. 05-25; at 5 (filed May 24, 2012).

our public institutions pay inflated BDS rates to a handful of monopoly telecom providers in what amounts to a no-bid contract for critical connectivity. BDS reform would enable more public dollars to be put to work in service of our communities.

The high-cost of BDS not only stifles economic growth and public investment, but it is also compromising America's future competitiveness in an increasingly connected global economy. BDS to cell sites, or backhaul, is one of the largest operating expenses for wireless carriers.[11] Because wireless providers have almost no choice but to buy exorbitantly priced backhaul to operate their networks, the prices consumers ultimately pay for wireless service is artificially inflated. Additionally, the high price of BDS is a significant barrier (albeit, by no means the only significant barrier) to new competitive entry in the wireless market. As SpectrumCo (a joint venture among the nation's largest cable companies, including Comcast, Time Warner Cable, and Bright House) explained in 2012 as it attempted to sell its AWS-1 spectrum licenses to Verizon Wireless, the high costs of building and operating a new standalone wireless network, along with other likely costs, meant that the likely return on investment "would not warrant the significant costs and risks involved" in entering the wireless market.[12]

Notably, competitive BDS rates would benefit the entire broadband ecosystem – customers and consumers, as well as incumbent, competitive, and emerging BDS providers. Lower input costs lead to increased levels of overall consumption. Therefore, Commission action to promote competition and reign in unjust and unreasonable BDS rates should result in customers and consumers using more broadband overall, to the benefit of the entire internet ecosystem.[13]

Reform of the broken BDS market would instead allow competitive wireless carriers to pass savings along to consumers, while also investing in next-generation networks and wireless infrastructure. Chairman Wheeler has called American leadership in 5G wireless networks a "national priority," and he remains correct that "without a healthy BDS market, we put at risk the "enormous opportunity for economic growth, job creation and U.S. competitiveness that 5G represents."[14]

---

[11] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services; WT Docket. No. 15-25; *Eighteenth Report*, 30 FCC Rcd 14515, 14564 ¶ 69 (2015) ("Backhaul connections are an integral component of a wireless service provider's network, and the cost of backhaul is approximately 30 percent of the operating cost of providing wireless service.").

[12] *See* Applications of Cellco Partnerships d/b/a Verizon Wireless, SpectrumCo, LLC and Cox TMI Wireless, LLC Seek Consent to the Assignment of AWS-1 Licenses, WT Docket No. 12-4, Declaration of Robert Pick, 3-5 (filed Dec. 16, 2011).

[13] *See* INCOMPAS letter to Marlene H. Dortch, Secretary, FCC; WC Docket Nos. 16-143, 05-25; at 1 (filed July 28, 2016) ("Competitive reform—that includes meaningful price reduction—in the [BDS] market will promote a 'virtuous cycle' of investment and development, because . . . competition spurs innovation by network providers, which drive end-user demand for more advanced broadband services, which in turn stimulates competition among providers to further invest in their broadband networks and the services offered over those networks.").

[14] Chairman Tom Wheeler, Federal Communications Commission, Remarks at INCOMPAS Policy Summit (Apr. 11, 2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-338806A1.pdf.

Lastly, and the burden of supra-competitive BDS prices paid by retailers, financial institutions, hospitals, wireless carriers, schools and libraries, and government agencies – ultimately falls on consumers. As CFA noted, half of the $40 billion in annual BDS charges are overcharges that are the result of incumbent LEC market power, and those costs are passed through to consumers.[15] BDS reform is necessary to protect the public against these excessive costs that we all bear in the form of higher prices, lower economic growth, fewer jobs, and less innovation.

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Phillip Berenbroick

Senior Policy Counsel
Public Knowledge
1818 N St., NW
Suite 410
Washington, D.C. 20036
(202) 861-0020

Cc: Stephanie Weiner
Bill Dever
William Layton

[15] Cooper, *supra* note 8, at 1, 5.